

Matter of Lopez v Fischer

2009 NY Slip Op 32859(U)

December 2, 2009

Supreme Court, Nassau County

Docket Number: 17025/09

Judge: Ute W. Lally

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCAN
mg

MEMORANDUM

SUPREME COURT, STATE OF NEW YORK

In the Matter of the Application of
PAUL LOPEZ,

Petitioner,

- against -

HON. RHONDA FISCHER, Judge of the District
Court, Nassau County,

Respondent(s).

By LALLY, J.
IAS/TRIAL PART 5
NASSAU COUNTY
INDEX NO. 17025/09
MOTION DATE: 9/16/09
MOTION SEQUENCE NO. 1
X X X

LEGAL AID SOCIETY
Attorney for Petitioner
One Hellen Keller Way
Hempstead, NY 11550

ATTORNEY GENERAL
Attorney for Respondent
200 Old Country Road
Mineola, NY 11501

The petitioner moves this court for an order pursuant to CPLR Article 78 granting judgment prohibiting the respondent from continuing the Temporary Stay Away Order of Protection (hereafter TOP) against the petitioner issued at his July 12, 2009 arraignment on the charge of Penal Law § 120.00(2), Reckless Assault in the Third Degree, a class A misdemeanor, absent holding a TOP hearing and from otherwise enforcing the respondent's order. The respondent opposes the motion, in its entirety.

On July 12, 2009 the petitioner, pursuant to a complaint by Julia Ramirez, was arrested for violating PL § 120.00(2), Reckless Assault in the Third Degree, a class A misdemeanor. On that same day, Hon. Bonnie Chaiken, Judge of the District Court, Nassau County, arraigned the petitioner/defendant. Over defense counsel's objection, Judge Chaiken set bail and as a condition of bail, issued a TOP. Although defense counsel requested that a hearing be held concerning the propriety of issuing a TOP, no hearing was conducted at that time. Instead, the judge ordered that the TOP hearing be held on the date of the next adjournment, July 15, 2009. On that date, the petitioner/defendant appeared before the respondent. After hearing arguments from both the defense and the prosecution regarding whether or not to hold a TOP hearing, she denied defense counsel's application for the hearing. At the same time, the respondent ordered that the TOP remain in effect and the case was adjourned until September 3, 2009.

The defendant/petitioner, when arrested in the criminal matter and for some time prior, shared a residence with the complainant, Ms. Ramirez, and their child. Pursuant to the TOP, the petitioner was required, *inter alia*, to stay away from the complainant at her home. This resulted in his inability to legally live in his home.

In determining whether or not to grant the relief requested by the petitioner, the court must first determine if the action is properly brought as a CPLR Article 78 proceeding. A Writ of Prohibition is recognized as an extraordinary proceeding that should not be granted liberally. Courts have imposed numerous restrictions on its use. McKinney's Practice Commentaries to CPLR § 7801 outlines two threshold questions in prohibition: whether the body or officer was acting in a judicial or quasi-judicial capacity; and whether the error was jurisdictional in nature. Assuming, as in this case, the answer to the first question is "yes" a court must then consider if the alleged error constituted a lack or excess of jurisdiction or was it merely an error of substantive or procedural law. In the case of the latter, prohibition will not lie. If the error is deemed jurisdictional in nature, further factors must be weighed by the court in exercising its discretion. These are: " the gravity of the harm caused by the act sought to be performed by the official; whether the harm can be adequately corrected on appeal or by recourse to ordinary proceedings at law or in equity; and whether prohibition would furnish 'a more complete and efficacious remedy. . . even though other methods of redress are technically available'" (*Rush v Mordue*, 68 NY2d 348, 354, quoting *Dondi v Jones*, 40 NY2d 8, 14).

As to the issue of jurisdiction, this court finds that the respondent exceeded her jurisdiction when she refused to comply with the bail order of a judge of concurrent jurisdiction, without good cause. Judge Chaiken set bail for the petitioner/defendant and as a condition of the bail issued a TOP. She also unequivocally ordered that a TOP hearing be held on the following adjourned date. On that date, the respondent failed to hold a hearing, although she did hear both sides on the issue of whether or not a TOP hearing should be held. Oral argument on the possibility of having a hearing is not, however, the equivalent of actually holding the hearing on the issue of whether the TOP should be continued. Additionally, a court of concurrent jurisdiction cannot modify bail status absent a finding of good cause to warrant the change [*People v Mohammed*, 171 Misc2d 130

(Sup.Ct., Kings Cty., 1996); CPL §530.60(1)]. Here, when the respondent continued the TOP without holding a hearing, she was in effect changing an aspect of the petitioner/defendant's bail status without good cause.

The next consideration is the gravity of harm caused by the act sought to be performed. In the instant case, the TOP resulted in the petitioner/defendant being totally excluded from his residence. By continuing the TOP without holding a hearing, the respondent deprived the petitioner/defendant of significant interests in his home to which he is constitutionally entitled [*Fuentes v Shevin*, 407 US 67 (1972); *People v Forman*, 145 Misc2d 115, 129, (Crim.Ct., NY Cty., 1989)].

The next factor that must be considered is whether the harm can be adequately corrected on appeal or by recourse to ordinary proceedings at law or in equity. Although an order setting bail cannot be appealed, CPL § 530.30 allows for one application for review of a bail or recognizance order by a superior court judge. Said review is limited to just three issues, none of which applies to the instant case. Clearly the arraignment judge had jurisdiction to initially set the bail and issue a TOP (CPL § 530.30(1)(a)). Secondly, no application for recognizance or bail has been denied (CPL § 530.30(1)(b)). Lastly, the petitioner/defendant is not challenging the amount of bail as excessive (CPL § 530.30(1)(c)). Since the petitioner/defendant's application does not fall within any of the grounds enumerated, he is, in effect, left without means, other than a special proceeding, to challenge the respondent's order.

In light of the foregoing factors, the writ of prohibition against the respondent is the proper vehicle for the petitioner. The respondent should be prohibited from continuing the TOP against the petitioner, unless a hearing is held on the issue of whether the TOP should, in fact, be continued in effect. Although the petitioner believes that a full evidentiary hearing would best protect his due process rights, the necessity of such is less than certain. Since the procedure for such a hearing is not specified in CPL §§ 530.11 or 530.12, nor elsewhere in the CPL, the issue of what type of hearing is required remains murky. And, while there is case law on the subject, it is not necessarily controlling [See, *People v Forman*, 145 Misc2d 115 (Crim. Ct. NY Cty., 1989)].

In order to decide what type of hearing is required, the

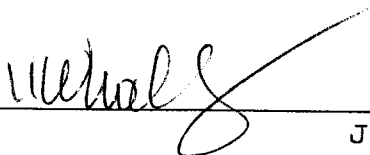
interests of the defendant must be weighed against the interests of the government. The petitioner's interest is in a prompt hearing which protects his due process rights to his home. Against this, one must measure the burden placed upon the government in terms of the time and judicial resources required to conduct the TOP hearing. Moreover, the government's interest in protecting victims, in general, and specifically victims of domestic violence, is of paramount importance. Domestic violence victims should not be worn down by having to repeatedly appear in court to face their abusers.

Accordingly, while the TOP hearing ordered by Judge Chaiken is mandatory, the form said hearing should take is left to the discretion of the judge conducting it. Clearly, although a full evidentiary hearing is permissible and of course desirable from the petitioner's point of view, is it not mandatory. A more limited form of hearing could also suffice, as could an *in camera* interview of the complainant by the judge, or some other variation or combination, which would not be unduly onerous to the complainant. What is required is that the judge ascertain the facts necessary to decide whether or not the TOP should be continued, *i.e.*, is there a continuing danger of injury or intimidation to the complainant. Given the very limited scope of the hearing and the minimal drain on the courts' resources which would result, the petitioner/defendant's right to a hearing should prevail. Parenthetically, considerable resources would have been saved had a brief TOP hearing been held on the adjourn date, as ordered by Judge Chaiken.

Therefore, based upon the foregoing, the petitioner's motion for a writ of prohibition is granted to the extent that the respondent is prohibited from continuing the TOP, in the absence of a TOP hearing. In order to protect the complainant from any possible harm, a TOP hearing should be held forthwith, prior to the possible *vacatur* of the TOP.

Settle judgment on notice.

Dated: DEC 02 2009



 J.S.C.